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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 196....

No. .....

THE CITY OF TULSA, OKLAHOMA,
A Municipal Corporation, *Petitioner*,

vs.

MIDWESTERN DEVELOPMENTS, INC.,
An Oklahoma Corporation, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The City of Tulsa, Oklahoma, an Oklahoma Municipal Corporation, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case of the 11th day of July, 1964.

OPINIONS BELOW

The opinion of the District Court, printed in Appendix B-1 hereto, *infra*, pp. 33-34, is unreported. The opinion of the Court of Appeals, printed in Appendix B-2, hereto, *infra*, pp. 34-38, is reported in 333 F. 2d 1009

JURISDICTION

The judgment of the Court of Appeals was entered on the 11th day of July, 1964, R. 4. A motion for rehearing was denied on the 19th day of August, 1964, R. 6. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Plaintiff's Amended Complaint as to the first cause of action, being to quiet title, and the second cause of action, being for reverse condemnation, properly alleges causes of action which arise under the Constitution, laws or treaties of the United States so as to vest jurisdiction in the District Court under 28 U. S. C., Section 1331.

2. Whether, in a complaint in an action to quiet title to property of which the Plaintiff has never been in possession, it is a proper and necessary allegation that the Defendant's predecessor in title was conveyed an easement rather than fee simple title, or any other allegation of an infirmity in Defendant's title.

3. Whether a cause of action in reverse condemnation arises under the laws of the United States so as to vest jurisdiction in the District Court under 28 U. S. C., Section 1331, where no diversity of citizenship exists.

4. Whether, a cause of action to quiet title is properly alleged so as to vest jurisdiction in the District Court under 28 U. S. C., Section 1331, where an abutter to property claims that said property was conveyed at a time when the Enid and Anadarko Act (Act of February 28, 1902, 32 Stat. 43) was in effect, that the deed conveyed an easement rather than fee simple title, and that the grantee of such estate has abandoned the same which therefore reverts to such abutter, notwithstanding that the deed states on its face that a fee simple title is conveyed and the Enid and Anadarko Act provides only for a reversion to the Tribe of Indians from whom lands have been taken, where the Plaintiff is not a Tribe of Indians and the lands were conveyed by deed and not taken.

STATUTE INVOLVED

The Act of Congress involved is set out in Appendix A, *infra*, pages 12-33.

STATEMENT

The property in question was a portion of the allotment of a minor Creek Freedman, whose guardian conveyed the same by deed in language conveying fee simple title to the Missouri-Kansas and Oklahoma Railroad Company, which deed provided that it was made under the

authority of the provisions of the Act of Congress of March 2, 1899, which deed is dated September 10, 1902.

The strip of land in question covers the southwesterly portion of a quarter section of land in the southeastern area of the City of Tulsa, in Tulsa County, Oklahoma. The balance of the quarter section was conveyed to other parties who, by mesne conveyances, have conveyed to Midwestern Developments, Inc. The deed to Midwestern Developments, Inc., covers "all of the land in the NW¼ of said Section 22, *lying North of the M. K. & T. Railroad*". The Missouri-Kansas and Oklahoma Railroad Company was succeeded by the Missouri-Kansas and Texas Railroad who constructed a railroad line across this property, which was a total width of 150', which enters Oklahoma at a point near Dennison, Texas running through Muskogee, Oklahoma and Tulsa, Oklahoma, to connect with the Missouri-Kansas and Texas main line at a point in North Central Oklahoma.

In 1955 the Missouri-Kansas and Texas Railroad Company conveyed the surface ownership to the subject property, being generally the North 60' of the 150' strip conveyed by the allottee's deed, to be used as right of way for a limited access highway and no other purpose. The City of Tulsa acquired this property, together with others, as a portion of its metropolitan expressway program developed in cooperation with the Oklahoma State Highway Department and the United States Bureau of Public Roads to construct a divided four lane limited access highway generally between the City of Tulsa and

the City of Broken Arrow, Oklahoma, a distance of approximately 20 miles. The location of the highway generally parallels the alignment of the Missouri-Kansas and Texas Railroad between said Cities.

On September 24, 1962, Midwestern Developments, Inc., filed an action against the City of Tulsa to quiet title to the 60' strip and for damages for the purported taking thereof in the nature of reverse condemnation in the United States District Court for the Northern District of Oklahoma, as Case #5478, Civil.

On December 14, 1962, Midwestern Developments, Inc., filed an action against the City of Tulsa in the State District Court in Tulsa County, Oklahoma for the same causes of action, which case is currently pending in the State District Court.

On June 28, 1963, Midwestern Developments, Inc., filed its Amended Complaint in the case pending in the United States District Court for the Northern District of Oklahoma, to which the City of Tulsa filed a Motion to Dismiss on the grounds that said causes of action did not arise under the Constitution, laws or treaties of the United States, and that therefore the United States District Court was without jurisdiction. The City of Tulsa's Motion to Dismiss on jurisdictional grounds was sustained by the Trial Court and Midwestern Developments, Inc., perfected an appeal to the United States Court of Appeals for the Tenth Circuit.

On July 11, 1964, the Court of Appeals entered its opinion and judgment reversing the decision of the Unit-

ed States District Court, holding in essence that the United States District Court did have jurisdiction. A Motion for Rehearing was filed by the City of Tulsa, and on August 19, 1964, said Motion for Rehearing was denied by the Court of Appeals. The basis relied upon by Midwestern Developments, Inc., for jurisdiction in the United States District Court was that their claim arose under the Constitution, laws or treaties of the United States and involved an amount in excess of $10,000.00. Both parties to the litigation are Oklahoma corporations. The Petitioner has claimed throughout that the only allegations required to properly allege the cause of action to quiet title were those showing the complainant's chain of title, and the allegations which attempted to anticipate the defense of the City as to the basis for its title and any alleged infirmities therein should be regarded as mere surplusage and not considered by the Court in determining the question of original jurisdiction. The complainant alleged that the nature of the estate conveyed to the petitioner's predecessor was governed by the Act of Congress of February 28, 1902, 32 Stat. 43, commonly known as the Enid-Anadarko Act. However, this Act does not create any title in the Plaintiff, nor does the Plaintiff so allege. The City has not filed any responsive pleading or statement of its claim of title, if any, and particularly whether its title is based upon the grant by the allottee's guardian or by adverse possession. In either case, the Enid-Anadarko Act could only operate to possibly restrict the nature of the estate granted by the allottee to the railroad which would only be considered if the City elects

to rely upon such deed as being the basis for its title and if the Trial Court concludes that such deed is governed by the Enid-Anadarko Act and to what extent. Therefore, the consideration of that Act does not involve the plaintiff proving its case, but would only arise properly in the third stage of the pleadings, which has not yet arrived.

The plaintiff has not pleaded or suggested in any manner how the right sought to be enforced in the second cause of action for reverse condemnation arises under the laws of the United States and the District Court is unquestionably without jurisdiction as to that cause of action.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals, is in direct conflict with the opinions of this Court in the case of *Taylor* v. *Anderson*, 34 S. Ct. 724, 234 U. S. 74, 58 L. Ed. 1218, and the case of *Gully* v. *First National Bank*, 299 U. S. 109, 81 L. Ed. 70, and the opinion in *Deere* v. *St. Lawrence River Power Company*, C. C. A., New York, 1929, 32 F. 2d 550, and *Phelps* v. *Hanson*, C. C. A., Montana, 1947, 163 F. 2d 973.

In the *Taylor* case, this Court stated, "* * * that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, must be determined from what necessarily appears in the plaintiff's statement of his own

claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose."

In the *Gully* case, this Court held, "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." "A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." "Today, even more clearly than in the past, 'the federal nature of the right to be established is decisive—not the source of the authority to establish it.'"

To the same effect is the *Deere* case and the *Phelps* case.

In this case, all the Plaintiff needed to allege was to trace its title and allege that the Defendant claims some right therein adverse to that of the Plaintiff. Those allegations which purport to show the Defendant's title, suggesting that the Defendant will rely upon the Enid and Anadarko Act, or any infirmities in the Defendant's title should be disregarded as a basis to show that the right which the Plaintiff seeks to enforce was created by a law of the United States, namely the Enid and Anadarko Act.

Whatever title the Plaintiff has, was created by the validity and effect of the various conveyance in its chain of title, which are based purely on local law and do not involve any right created by a law of the United States.

The opinion of the Court of Appeals, however, stated that "the result of the suit must depend upon the construction and effect of such law", and, "It is sufficient that the statute invoked as determinative of the nature of the estate granted is not clearly inapplicable * * *". Holding that the result of the suit must depend upon the construction of such a law is not at all the same as holding that the right sought to be enforced must be created by such law. Also, the effect of such law as perhaps determining the nature of the estate granted, is not applicable, in that it is not necessary to even consider what estate, if any, was granted to the Defendant's predecessor in title, until after the Plaintiff has proved his title; and would further assume, that the Defendant would or might rely upon the deed to the Railroad as the basis for its title, which is likewise presumptuous, inasmuch as the Defendant would most likely rely upon adverse possession of the property for over fifty years as the basis for its title, however, this question would not be before the court until after the Plaintiff has first proved its title.

2. Clearly it is of importance to settle the question of when a cause of action arises out of a law of the United States to vest jurisdiction in the United States Courts in cases of all types. The Petitioner suggests that to sustain jurisdiction in this case would open the door to nearly

all quiet title suits in Oklahoma, and other States, where the title to all lands are affected in some way by an Indian Treaty or an Act of Congress involving Indians. Unless the Federal nature of the right is clearly shown, jurisdiction should not be permitted in the United States Courts. In this particular instance, the decision in this case will probably determine the question of jurisdiction in approximately 200 cases which are expected to be filed arising out of this same controversy. It seems therefore that it is in the public interest for this Court to settle the question.

3. To allow the judgment below to stand would also permit all actions in reverse condemnation, and apparently all actions in direct condemnation, to be filed in the United States Courts without any reference to the laws of the United States which would create an intolerable conflict between the Courts of the various States and the United States Courts.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES E. NORMAN,
City Attorney,

JOHN ROBERT SEELYE,
Assistant City Attorney,
Municipal Building,
Tulsa, Oklahoma,
Counsel for Petitioner.

APPENDIX A

ACT OF FEBRUARY 28, 1902

(ENID-ANADARKO ACT)

32 STAT. 43

An Act to grant the right of way through the Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Enid and Anadarko Railway Company, a corporation created under and by virtue of the laws of the Territory of Oklahoma, be, and the same is hereby, invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Territory of Oklahoma and the Indian Territory, beginning at a point on its railway between Anadarko and Watonga, in the Territory of Oklahoma, thence in an easterly direction by the most practicable route to a point on the eastern boundary of the Indian Territory near Fort Smith, in the State of Arkansas, together with such branch lines to be built from any point on the line above described to any other point in the Indian Territory as said railway company may at any time hereafter decide to construct, with the right to construct, use, and maintain such tracks, turn-outs, sidings, and extensions as said company may deem to its interest to construct along and upon the right of way and depot grounds hereby granted.

RIGHT OF WAY OF 100 FEET
TELEPHONE AND TELEGRAPH LINES.

§ 2. That said corporation is authorized to take and use for all purposes of a railway, and for no other purpose, a right of way one hundred feet in width through said Oklahoma Territory and said Indian Territory, and to take and use a strip of land two hundred feet in width, with a length of two thousand feet, in addition to right of way, for stations, for every eight miles of road, with the right to use such additional ground where there are heavy cuts or fills as may be necessary for the construction and maintenance of the roadbed, not exceeding one hundred feet in width on each side of said right of way, or as much thereof as may be included in said cut or fill; Provided, That no more than said addition of land shall be taken for any one station: Provided further, That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railway, telegraph, and telephone lines; and when any portion thereof shall cease to be so used such portion shall revert to the nation or tribe of Indians from which the same shall have been taken.

COMPENSATION FOR LANDS TAKEN.
APPRAISEMENT OF DAMAGES.
REFEREES TO ACT.
HEARINGS, PLACE FOR.
WITNESS FEES.
APPEALS.
FIXING OF COSTS IN APPEALED CASES.

§ 3. That before said railway shall be constructed through any lands held by individual occupants according to the laws, customs, and usages of any of the Indian nations or tribes through which it may be constructed, full compensation shall be made to such occupants for all property to be taken or damage done by reason of the construction of such railway. In case of failure to make amicable settlement with any occupant, such compensation shall be determined by the appraisement of three disinterested referees, to be appointed, one (who shall act as chairman) by the Secretary of the Interior, one by the chief of the nation to which said occupant belongs, and one by said railway company, who, before entering upon the duties of their appointment, shall take and subscribe, before a district judge, clerk of a district court, or United States commissioner, an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award to and filed with the Secretary of the Interior within sixty days from the completion thereof; and a majority of said referees shall be competent to act in case of the absence of a member, after due notice. And upon the failure of either party to make such appointment within thirty days after the appointment

made by the Secretary of the Interior, the vacancy shall be filled by a judge of the United States court for the Indian Territory upon the application of the other party. The chairman of said board shall appoint the time and place for all hearings within the nation to which such ocupant belongs. Each of said referees shall receive for his services the sum of four dallars per day for each day they are engaged in the trial of any case submitted to them under this Act, with mileage at five cents per mile. Witnesses shall receive the usual fees allowed by the courts of said nations. Cost, including compensation of the referees, shall be made a part of the award, and be paid by such railway company. In case the referees can not agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right, within ninety days after the making of the award and notice of the same, to appeal by original petition to the United States court for the Indian Territory, which court shall have jurisdiction to hear and determine the subject-matter of said petition, according to the laws of the Territory in which the same shall be heard provided for determining the damage when property is taken for railroad purposes. If upon the hearing of said appeal the judgment of the court shall be for a larger sum than the award of the referees, the cost of said appeal shall be adjudged against the railroad company. If the judgment of the court shal' be for the same sum as the award of the referees, then the costs shall be adjudged against the appellant. If the judgment of the court shall be for a smaller sum than

the award of the referees, then the costs shall be adjudged against the party claiming damages. When proceedings have been commmenced in court, the railway company shall pay double the amount of the award into court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railway.

RATES.
STATE GOVERNMENT TO REGULATE.
CARRYING OF MAIL.

§ 4. That said railway company shall not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the Territory of Oklahoma for services or transportation of the same kind: Provided, That passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway and messages on said telegraph and telephone lines until a State government or governments shall exist in said Territory within the limits of which said railway, or a part thereof, shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one State into another, or shall extend into more than one State: Provided, however, That the

rate of such transportation of passengers, local or interstate, shall not exceed the rate above expressed: And provided further, That said railway company shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of comepnsation.

RAILWAY COMPANIES TO PAY FOR PROPERTY DAMAGES.
RIGHT OF APPEAL FROM AWARDS.
RAILROAD TO PAY $15.00 PER MILE.
APPORTIONMENT OF MONEY BETWEEN NATIONS.

§ 5. That said railway company shall pay to the Secretary of the Interior, for the benefit of the particular nations or tribes through whose lands said main line and branches may be located, the sum of fifty dollars, in addition to compensation provided for in this Act for property taken and damages done to individual occupants by the construction of the railway, for each miles of railway that it may construct in said Territory, said payments to be made in installments of five hundred dollars as each ten miles of road is graded: Provided, That if the general council of said nations or tribes through whose lands said railway may be located or the principal executive officer of the tribe if the general council be not in session shall, within four months after the filing of maps of definite location, as set forth in section six of this Act, dissent from the allowances provided for in this section, and shall certify the same to the Secretary of the Interior, then all compensation to be paid to such dissenting na-

tion or tribe under the provisions of this Act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of lands, with the right of appeal to the courts upon the same terms, conditions, and requirements as therein provided: Provided further, That the amount awarded or adjudged to be paid by said railway company for said dissenting nation or tribe shall be in lieu of the compensation that said nation or tribe would be entitled to receive under the foregoing provisions. Said company shall also pay, so long as said Territory is owned and occupied by the Indians in their tribal relations, to the Secretary of the Interior the sum of fifteen dollars per annum for each mile of railway it shall construct in said Territory. The money paid to the Secretary of the Interior under the provisions of this Act shall be apportioned by him in accordance with the laws and treaties now in force between the United States and said nations or tribes, according to the number of miles of railway that may be constructed by said railway company through their lands: Provided, That Congress shall have the right, so long as said lands are occupied and possessed by said nation or tribe, to impose such additional taxes upon said railway as it may deem just and proper for their benefit; and any Territory or State hereafter formed through which said railway shall have been established may exercise the like power as to such part of said railway as may lie within its limits. Said railway company shall have the right to survey and locate its railway immediately after the passage of this Act.

MAPS TO BE FILED SHOWING LOCATIONS, ETC. LOCATIONS TO BE APPROVED BY SECRETARY.

§ 6. That said company shall cause maps, showing the route of its located line through said Territory, to be filed in the office of the Secretary of the Interior, and also to be filed in the office of the principal chief of each of the nations or tribes through whose lands said railway may be located, and after the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said company: Provided, That when a map showing any portion of said railway company's located line is filed as herein provided for, said company shall commence grading said located line within six months thereafter, or such location shall be void; and said location shall be approved by the Secretary of the Interior in sections of twenty-five miles before construction of any such section shall be begun.

RAILROAD EMPLOYEES TO RESIDE ON RIGHT OF WAY.

§ 7. That the officers, servants, and employees of said company necessary to the construction and management of said road shall be allowed to reside, while so engaged, upon such right of way, but subject to the provisions of the Indian intercourse laws, and such rules and regulations as may be established by the Secretary of the Interior in accordance with said intercourse laws.

JURISDICTION OF U. S. COURTS.

§ 8. That the United States court for the Indian Territory and such other courts as may be authorized by Congress shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising between the said Enid and Anadarko Railway Company and the naiton and tribe through whose territory said railway shall be constructed. Said courts shall have like jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nation or tribe and said railway company; and the civil jurisdiction of said courts is hereby extended within the limits of said Indian Territory, without distinction as to citizenship of the parties, so far as may be necessary to carry out the provisions of this Act.

SO MUCH SHALL BE BUILT IN ONE YEAR.

§ 9. That said railway company shall build at least one-tenth of its railway in said Territory within one year after the passage of this Act, and complete its road within three years after the approval of its map of location by the Secretary of the Interior or the rights herein granted shall be forfeited as to that portion not built; that said railway company shall construct and maintain continually all road and highway crossings and necessary bridges over said railway wherever said roads and highways do not or may hereafter cross said railway's right of way, or may be by the proper authorities laid out across the same.

ENID AND ANADARKO RAILWAY COMPANY.

§ 10. That the said Enid and Anadarko Railway Company shall accept this right of way upon the express condition, binding upon itself, its successors, and assigns, that they will neither aid, advise, nor assist in any effort looking toward the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian nation any further grant of land, or its occupancy, than is hereinbefore provided: Provided, That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this Act.

MORTGAGES OF RAILROAD COMPANY.

§ 11. That all mortgages executed by said railway company conveying any portion of its railway, with its franchises, that may be constructed in said Indian Territory, shall be recorded in the Department of the Interior, and the record thereof shall be evidence and notice of their execution, and shall convey all rights, franchises, and property of said company as therein expressed.

CONGRESS MAY AMEND LAWS.

§ 12. That Congress may at any time amend, add to, alter, or repeal this Act; and the right of way herein and hereby granted shall not be assigned or transferred in any form whatever prior to the construction and completion of the road, except as to mortgages or other liens

that may be given or secured thereon to aid in the construction thereof.

RIGHT TO CONDEMN LANDS

§ 13. That the right to locate, construct, own, equip, operate, use, and maintain a railway and telegraph and telephone line or lines into, in, or through the Indian Territory, together with the right to take and condemn lands for right of way, depot grounds, terminals, and other railway purposes, in or through any lands held by any Indian tribe or nation, person, individual, or municipality in said Territory, or in or through any lands in said Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any railway company organized under the laws of the United States, or of any State or Territory, which shall comply with this Act.

RIGHT OF WAY TO BE 100 FEET IN WIDTH. SECTION GROUNDS, SHOPS, ETC.

§ 14. That the right of way of any railway company shall not exceed one hundred feet in width except where there are heavy cuts and fills, when one hundred feet additional may be taken on each side of said right of way; but lands additional and adjacent to said right of way may be taken and condemned by any railway company for station grounds, buildings, depots, side tracks, turn-

outs, or other railroad purposes not exceeding two hundred feet in width by a length of two thousand feet. That additional lands not exceeding forty acres at any one place may be taken by any railway company when necessary for yards, roundhouses, turntables, machine shops, water stations, and other railroad purposes. And when necessary for a good and sufficient water supply in the operation of any railroad, any such railway company shall have the right to take and condemn additional lands for reservoirs for water stations, and for such purpose shall have the right to impound surface water or build dams across any creek, draw, canyon, or stream, and shall have the right to connect the same by pipe line with the railroad and take the necessary grounds for such purposes; and any railway company shall have the right to change or straighten its line, reduce its grades or curves, and locate new stations and to take the lands and right of way necessary therefor under the provisions of this Act.

COMPENSATION TO OWNERS OF LANDS.

§ 15. That before any railroad shall be constructed or any lands taken or condemned for any of the purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damages done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands, and to the tribe or nation through or in which the same is situated: Provided, That correct maps

of the said line of railroad in sections of twenty-five miles each and of any lands taken under this Act, shall be filed in the Department of the Interior, and shall also be filed with the United States Indian agent for Indian Territory, and with the principal chief or governor of any tribe or nation through which the lines of railroad may be located or in which said lines are situated.

FAILURE TO MAKE SETTLEMENT.
REFEREES TO HEAR WITNESSES.
GIVE TWENTY DAYS NOTICE TO
PERSONS AFFECTED.
NOTICE TO TRIBE.

In case of the failure of any railway company to make amicable settlement with any individual owner, occupant, allottee, tribe, or nation for any right of way or lands or improvements sought to be apportioned or condemned under this Act, all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe or nation by reason of the appropriation and condemnation of said right of way, lands, or improvements shall be determined by the appraisement of three disinterested referees, to be appointed by the judge of the United States court, or other court of jurisdiction in the district where such lands are situated, on application of the corporation or other person or party in interest. Such referees, before entering upon the duties of their appointment, shall each take and subscribe, before competent authority, an oath that he will faithfully and impartially discharge the duties of his appointment, which

oaths, duly certified, shall be returned with the award of the referees to the clerk of the court by which they were appointed. The referees shall also find in their report the names of the person and persons, tribe, or nation to whom the damages are payable and the interest of each person, tribe, or nation in the award of damages. Before such referees shall proceed with the assessment of damages for any right of way or other lands condemned under this act, twenty days' notice of the time when the same shall be condemned shall be given to all persons interested, by publication in some newspaper in general circulation nearest said property in the district where said right of way or said lands are situated, or by ten days' personal notice to each person owning or having any interest in said lands or right of way: Provided, That such notice to any tribe or nation may be served on the principal chief or governor of the tribe. If the referees cannot agree, then any two of them are authorized to and shall make the award. Any party to the proceedings who is dissatisfied with the award of the referees shall have the right, within ten days after the making of the award, to appeal, by original petition, to the United States court, or other court of competent jurisdiction, sitting at the place nearest and most convenient to the property sought to be taken, where the question of the damages occasioned by the taking of the lands in controversy shall be tried *de novo*, and the judgment rendered by the court shall be final and conclusive, subject, however, to appeal as in other cases.

AWARDS FOR DAMAGES.
COMPENSATION OF REFEREES.

When the award of damages is filed with the clerk of the court by the referees, the railway company shall deposit the amount of such award with the clerk of the court, to abide the judgment thereof, and shall then have the right to enter upon and take possession of the property sought to be condemned: Provided, That when the said railway company is not satisfied with the award, it shall have the right, before commencing construction, to abandon any portion of said right of way and adopt a new location, subject, however, as to such new location, to all the provisions of this Act. Each of the referees shall receive for his compensation the sum of four dollars per day, while actually engaged in the appraisement of the property and the hearing of any matter submitted to them under this Act. Witnesses shall receive the fees and mileage allowed by law to witness in courts of record within the districts where such lands are located. Costs, including compensation of the referees, shall be made part of the award or judgment and be paid by the railway company: Provided, That if any party or person other than the railway company shall appeal from any award, and the judgment of the court does not award such appealing party or person more than the referees awarded, all cost occasioned by such appeal shall be paid by such appealing party or person.

RAILROADS TO PAY $15.00 PER MILE.
STATE GOVERNMENTS TO REGULATE RAILROADS.

§ 16. That where a railroad is constructed under the provisions of this Act there shall be paid by the railway company to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile for each mile of road constructed, the same to be paid so long as said lands shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise provided herein; and the grants herein are made upon the condition that Congress hereby reserves the right to regulate the charges for freight and passengers on said railways and messages on all telegraph and telephone lines until a State government or governments shall exist in said Territory within the limits of which any railway shall be located; and then such State government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by such railways; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation, by said railways whenever such transportation shall extend from one State into another, or shall extend into more than one State; and that the railway companies shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation.

PROCEDURE WHERE ONE ROAD CROSSES ANOTHER ROAD.
CONDEMNATION PROCEDURE.
APPEALS.

§ 17. That any railway company authorized to construct, own, or operate a railroad in said Territory desiring to cross or unite its tracks with any other railroad upon the grounds of such other railway company shall, after fifteen days' notice in writing to such other railroad company, make application in writing to the judge of the United States court for the district in which it is proposed to make such crossing or connection for the appointment of three disinterested referees to determine the necessity, place, manner, and time of such crossing or connection. The provisions of section 3 of this act with respect to the condemnation of right of way through tribal or individual lands shall, except as in this section otherwise provided, apply to proceedings to acquire the right to cross or connect with another railroad. Upon the hearing of any such application to cross or connect with any other railroad, either party or the referees may call and examine witnesses in regard to the matter, and said referees shall have the same power to administer oaths to witnesses that is now possessed by United States commissioners in said Territory, and said referees shall, after such hearing and a personal examination of the locality where a crossing or connection is desired, determine whether there is a necessity for such crossing or not, and if so, the place thereof, whether it shall be over or under the existing railroad, or at grade, and in other respects

the manner of such crossing and the terms upon which the same shall be made and maintained: Provided, That no crossing shall be made through the yards or over the switches or side tracks of any existing railroad if a crossing can be effected at any other place that is practicable. If either party shall be dissatisfied with the terms of the order made by said referees it may appeal to the United States court of the Indian Territory for the district wherein such crossing or connection is sought to be made in the same manner as appeals are allowed from a judgment of a United States commissioner to said court, and said appeal and all subsequent proceedings shall only affect the amount of compensation, if any, and other terms of crossing fixed by said referees, but shall not delay the making of said crossing or connection: Provided, That the corporation desiring such crossing or connection shall deposit with the clerk of the court the amount of compensation, if any is fixed by said referees, and shall execute and file with said clerk a bond of sufficient security, to be approved by the court or a judge thereof in vacation, to pay all damages and comply with all terms that may be adjudged by the court. Any railway company which shall violate or evade any of the provisions of this section shall forfeit for every such offense, to the person, company, or corporation injured thereby, three times the actual damages sustained by the party aggrieved.

SIGNALS.
JURISDICTION OF INTERSTATE COMMERCE COMMISSION.

§ 18. That when in any case two or more railroads crossing each other at a common grade shall, by a system of interlocking or automatic signals, or by any works or fixtures to be erected by them, render it safe for engines and trains to pass over such crossings without stopping, and such interlocking or automatic signals or works or fixtures shall be approved by the Interstate Commerce Commissioners, then, in that case, it is hereby made lawful for the engines and trains of such railroad or railroads to pass over such crossing without stopping, any law or the provisions of any law to the contrary notwithstanding; and when two or more railroads cross each other at a common grade, either of such roads may apply to the Interstate Commerce Commissioners for permission to introduce upon both of said railroads some system of interlocking or automatic signals or works or fixtures rendering it safe for engines and trains to pass over such crossings without stopping, and it shall be the duty of said Interstate Commerce Commissioners, if the system of works and fixtures which it is proposed to erect by said company are, in the opinion of the Commission, sufficient and proper, to grant such permission.

AUTOMATIC SIGNALS.
COSTS OF MAINTAINING SIGNALS.

§ 19. That any railroad company which has obtained permission to introduce a system of interlocking

or automatic signals at its crossing at a common grade with any other railroad, as provided in the last section, may, after thirty days' notice, in writing, to such other railroad company, introduce and erect such interlocking or automatic signals or fixtures; and if such railroad company, after such notification, refused to join with the railroad company giving such notice in the construction of such works or fixtures, it shall be lawful for said company to enter upon the right of way and tracks of such second company, in such manner as to not unnecessarily impede the operation of such road, and erect such works and fixtures, and may recover in any action at law from such second company one-half of the total cost of erecting and maintaining such interlocking or automatic signals or works or fixtures on both of said roads.

MORTGAGES.

§ 20. That all mortgages executed by any railway company conveying any portion of its railway, with its franchises, that may be constructed in said Indian Territory, shall be recorded in the Department of the Interior, and the record thereof shall be evidence and notice of their execution, and shall convey all rights, franchises, and property of said company as therein expressed.

RIGHT OF CONGRESS TO AMEND.

§ 21. That Congress hereby reserves the right at any time to alter, amend, or repeal this Act, or any portion thereof.

SECRETARY MAY EXTEND TIME TO COMPLETE.

§ 22. That any railroad company which has heretofore acquired, or may hereafter acquire, under any other Act of Congress, a railroad right of way in Indian Territory may, in the manner herein prescribed, obtain any or all of the benefits and advantages of this Act, and in such event shall become subject to all the requirements and responsibilities imposed by this Act upon railroad companies acquiring a right of way hereunder. And where the time for the completion of a railroad in Indian Territory under any Act granting a right of way therefor has expired, or shall hereafter expire, in advance of the construction of such railroad or of any part thereof, the Secretary of the Interior may, upon good cause shown, extend the time for the completion of such railroad, or of any part thereof, for a time not exceeding two years from the date of such extension.

INCONSISTENT ACTS REPEALED.
ACT DOES NOT APPLY TO OSAGES.

§ 23. That an Act entitled "An Act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes," approved March second, eighteen hundred and ninety-nine, so far as it applies to the Indian Territory and Oklahoma Territory, and all other Acts or parts of Acts inconsistent with this Act are hereby repealed: Provided, That such repeal shall not affect any railroad company whose railroad is now

actually being constructed, or any rights which have already accrued; but such railroads may be completed and such rights enforced in the manner provided by the laws under which such construction was commenced or under which such rights accrued: And provided further, That the provisions of this Act shall apply also to the Osages' Reservation and other Indian reservations and allotted Indian lands in the Territory of Oklahoma, and all judicial proceedings herein authorized may be commenced and prosecuted in the courts of said Oklahoma Territory which may now or hereafter exercise jurisdiction within said reservations or allotted lands.

Approved, February 28, 1902.

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
OKLAHOMA

No. 5478, Civil

MIDWESTERN DEVELOPMENTS, INC., Plaintiff,

vs.

THE CITY OF TULSA, OKLAHOMA, a municipal corporation, Defendant.

ORDER OF DISMISSAL

The above styled matter came on for hearing before the Court, the Honorable Allen E. Barrow presiding, on August 30, 1963, on motion of the defendant, the City of Tulsa, Oklahoma, a municipal corporation, to dismiss the

plaintiff's complaint herein, and the Court finds that the said Motion to Dismiss should be sustained and the within action dismissed.

Midwestern-Developments, Inc. vs. The City of Tulsa, Okla.

It is therefore Ordered that the Motion to Dismiss is hereby sustained and this action be, and it is hereby dismissed.

Dated at Tulsa, Oklahoma, this 30th day of August, 1963.

Allen E. Barrow
Judge of the U. S. District Court

Filed Sept. 11, 1963.

APPENDIX B-2

OPINION

Filed United States Court of Appeals Tenth Circuit, Jul. 11, 1964. Robert B. Cartwright, Clerk.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY TERM—1964

No. 7511

MIDWESTERN DEVELOPMENTS, INC., Appellant,

vs.

THE CITY OF TULSA, OKLAHOMA, a municipal corporation, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Robert J. Woolsey, of Farmer, Woolsey, Flippo & Bailey, for Appellant.

John Robert Seelye (Charles E. Norman, City Attorney, with him on Brief), for Appellee.

Before MURRAH, Chief Judge, and PICKETT and LEWIS, Circuit Judges.

MURRAH, Chief Judge.

This is an appeal from a judgment dismissing, for lack of federal jurisdiction, a claim brought under 28 U. S. C., §1331 as one involving requisite amount in controversy and arising out of federal law. The suit sought to quiet title to and recover damages for the taking of a strip of land in Tulsa County, Oklahoma formerly part of a railroad right-of-way over a Creek Indian allotment. The trial Court did not think that the "necessary allegations" of the complaint stated a claim arising under federal law. We cannot agree.

The complaint alleged the allotment of the land to the Indian allottee, as provided by federal law, and execution by the allottee of a "Right-of-Way Deed," purporting to convey to the railroad a strip of land 150 feet wide, over a portion of the allotment. It further alleged that through mesne conveyances the appellant, Midwestern Developments, Inc., acquired title to a portion of the allotted land abutting the right-of-way. It then alleged that

the railroad company had conveyed, or attempted to convey, a 60 foot strip of the right-of-way abutting appellant's land, to the City of Tulsa for non-railroad purposes; that such conveyance constituted an abandonment of the strip of land for railroad purposes; and, that by force of federal law (Enid-Anadarko Act, February 28, 1902, 32 Stat. 43), pursuant to which the right-of-way was originally granted, the strip of land involved here reverted to appellant as the present owner of the abutting property. It was alleged that the City of Tulsa claims title to the strip of land in fee simple adverse to appellant, and the prayer is for judgment quieting title and damages in reverse condemnation for the taking of the land.

We know, of course, that a claim does not arise out of the laws of the United States so as to confer federal court jurisdiction merely because it may have its origin or source in federal law. The asserted right must depend upon the operative effect of federal law, i. e., the result of the suit must depend upon the construction and effect of such law. See: Prairie Band of Pottawatomie Tribe of Indians v. Puckkee (10 CA), 321 F. 2d 767, and cases cited. And, in determining whether the complainant has stated a genuine and substantial federal question on which the result depends, we look beyond the naked allegations and to the statement of his own claim "unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose." Taylor v. Anderson, 234 U. S. 74. See: Viles v. Symes (10 CA), 129 F. 2d 828; Martinez v. Southern Ute

Tribe (10 CA), 273 F. 2d 731; and Prairie Band of Pottawatomie Tribe of Indians v. Puckkee, supra. Cf. Norton v. Larney, 266 U. S. 511. But, jurisdiction to entertain the subject matter of the lawsuit does not depend upon whether the suitor is entitled to prevail. The court does not judge the merits of the lawsuit to determine jurisdiction. It will examine the plaintiff's pleadings to determine only whether the asserted claim has a substantial basis in federal law and is not merely a colorable statement that the claim does so arise.

The Right-Of-Way Deed in question is shown to have been executed in September, 1902, after the effective date of the Enid-Anadarko Act. That Act did grant to the Enid and Anadarko Railway Company the right to locate, operate and construct a railroad through the Indian Territory, and that railroad was authorized to "take and use for all purposes of a railway, and for no other purpose, a right-of-way * * *," provided that no part of such right-of-way "shall be leased or sold"; and, that when any portion shall cease to be used for railway purposes, such portion shall revert to the Tribe of Indians from which the same shall have been taken. This part of the statute has specific reference to the Enid and Anadarko Railway Company, which did not acquire and was never interested in this particular right-of-way. But, Section 13 of the Act does purport to grant "to any railway company" the right to locate, construct and maintain a railroad into and through the Indian Territory, together with the right to take and condemn lands for right-of-way purposes "in or through any lands in said Territory which have been

or may hereafter be allotted in severalty to any indivual Indian or other person * * *."

Appellee contends that no part of this Act is applicable to the right-of-way grant in this case and does not, therefore, operate to condition the nature of the estate acquired by the right-of-way deed from the Indian allottee. Such may well be the case. It may be that this case is clearly distinguishable from right-of-way cases over Indian lands in which federal jurisdiction has been sustained. See: St. Louis-San Francisco Railway Company v. Walter (10 CA), 305 F. 2d 90, and cases cited. But, in this posture of the case, we do not decide the merits of the lawsuit and we express or imply no opinion. It is sufficient that the statute invoked as determinative of the nature of the estate granted is not clearly inapplicable, and the complaint based thereon is not, therefore, wholly without foundation.

We hold that the complaint does state a claim for relief under federal law, and the case is accordingly REVERSED for trial on the merits.